82-1993

NO. _____

IN THE
SUPREME COURT OF THE UNITED STATES

October Term 1982

WILLIAM H. JOINER, JR.,
Petitioner

v.

KAREN H. VASQUEZ,
Respondent

PETITION FOR WRIT OF CERTIORARI
TO THE COURT OF APPEALS OF TEXAS
FOR THE FIFTH SUPREME JUDICIAL DISTRICT

APPENDIX

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TABLE OF CONTENTS

COURT OF APPEALS

FIFTH SUPREME JUDICIAL DISTRICT OF TEXAS

AT DALLAS

NO. 20558

WILLIAM HENRY JOINER, JR.

Appellant

VS.

MRS. KAREN H. VASQUEZ,

Appellee

FROM A DISTRICT COURT

OF DALLAS COUNTY, TEXAS

BEFORE CHIEF JUSTICE GUITTARD AND

AND JUSTICES AKIN AND CARVER

OPINION BY CHIEF JUSTICE GUITTARD

DECEMBER 11, 1981

William Henry Joiner, Jr. appeals from a denial of his bill of review attacking a decree terminating his parental rights in two children. We

affirm because Joiner's present bill of review is barred by a judgment rendered against Joiner in an earlier bill of review alleging similar grounds.

The record reflects that Joiner was married to Karen in 1967 and thereafter two children were born to them while they were residents of the State of Oklahoma. The parties were divorced in 1971 in Oklahoma proceedings, and the children remained in Oklahoma until 1974, when they moved to Texas. In 1976 Karen instituted a proceeding in the juvenile court of Dallas County to terminate Joiner's parental rights. A guardian ad litem was appointed to represent the children's interest. Personal service of process was first attempted upon Joiner and, thereafter, service was undertaken by publication and an attorney ad litem was appointed to represent Joiner. On June 3, 1976, following a trial before

the court, the juvenile court rendered final decree terminating Joiner's parental rights.

On the following February 24, 1977, Joiner filed his first bill of review attacking the termination decree on the grounds that he had a meritorious defense to the grounds alleged in the termination petition, that the record contained no evidence that termination of his parental rights would be in the best interest of the children, that he was not served by personal service and had no knowledge of the suit or the trial, that the appointed attorney ad litem did not contact him, that he was prevented from presenting his meritorious defense without negligence on his part, that the evidence at the trial did not support termination of his parental rights, and that in these respects he was denied his constitutional rights.

The court heard evidence on this first bill of review and denied the relief sought by an order signed September 22, 1977. Joiner did not appeal. Instead, the filed a second bill of review on the same grounds, which the court dismissed on a plea of res judicata. Again, he did not appeal. His present and third bill of review was filed January 3, 1980. In this bill of review he alleges the same grounds as in his first bill of review and other grounds as well. He alleges that citation by publication in the termination suit was improper because the officer's return did not show diligence in attempting personal service, that the appointed attorney ad litem did not provide effective representation, and that the evidence before the court in the earlier suit was insufficient to support termination. He also alleges that section 11.09 of the

Texas Family Code, which authorizes citation by publication to persons who cannot be notified by personal service or registered or certified mail, is unconstitutional because it requires publication only one time. He alleges that the first bill of review was brought within two years, the time permitted by Rule 329 of the Texas Rules of Civil Procedure for a motion for new trial after a judgment is rendered on citation served by publication. He further alleges that the judgment of September 22, 1977, denying his first bill of review, does not bar his present bill of review "because the defense of res judicata is not applicable to jurisdictional questions."

In response to the third bill of review, Karen filed a plea of res judicata based on the judgment denying the first bill of review. At a pretrial

hearing the plea of res judicata was sustained and judgment was rendered that the bill of review "be and the same is denied as a matter of law." The judgment recites that a guardian ad litem appointed by the court appeared and represented the children, but no pleading by him is shown.

Joiner first argues that the trial court was in error in sustaining the plea of res judicata because the facts he pleaded showed that the termination decree was void, and, therefore, the judgment denying the first bill of review could not give the void termination decree any validity or bar his current attack. To support this argument, Joiner relies on judicial expressions, such as those in Fulton v. Finch, 162 Tex. 351, 346 S.W.2d 823, 827 (1961), and Dews v. Floyd, 413 S.W.2d 800, 804-05 (Tex. Civ. App. - Tyler 1967, no writ), to the

effect that a void judgment is a nullity and may be disregarded anywhere at any time. From this premise, Joiner reasons that a judgment denying a bill of review does not bar a subsequent bill of review if the original judgment is void. Consequently, he insists, no matter how many bills of review may be attempted unsuccessfully, none can result in final disposition of the controversy until the voidness of the original judgment is correctly declared or the rights of third parties have intervened.

This argument is untenable for two reasons. First, the termination decree is not "void" in the sense that that term is used in the cases cited. It is a judgment which the juvenile court had jurisdictional power to render in the sense of jurisdiction over the subject matter. It is alleged to be "void" only because of lack of proper service of

process, that is to say, lack of jurisdiction of the person. Since it reveals no lack of jurisdiction on its face and recites proper service, it is not subject to collateral attack. Pure Oil Co. v. Reece, 124 Tex. 476, 78 S.W.2d 932, 934-35 (1935); Crawford v. McDonald, 88 Tex. 626, 33 S.W. 325, 328 (1895); Imatani v. Marmolejo, 606 S.W.2d 710, 713 (Tex. Civ. App. - Corpus Christi 180, no writ). Such a judgment is subject to attack only by a bill of review in which evidence of lack of service is adduced and a meritorious defense is shown. Deen v. Kirk, 508 S.W.2d 70, 72 (Tex. 1974); McEwen v. Harrison, 162 Tex. 125, 345 S.W.2nd 706, 710 (1961). For example, a divorce decree may be attacked in a bill of review on the ground that the record affirmatively shows that a waiver of process is invalid, but it is not subject to collateral attack on that ground,

since the court had jurisdictional power to determine validity of the waiver and to render the decree. Thus, we cannot agree that a termination decree rendered on defective service by publication is "void" in the sense that it may be disregarded anywhere and at any time. Deen v. Kirk, supra.

Second, the plea of res judicata was properly sustained because the judgment denying the first bill of review is conclusive on the issue of the court's jurisdiction in the termination suit. The first bill of review was a direct attack, and might properly have been considered as a motion for new trial within rule 329, to which the strict requirements of a bill of review did not apply because citation was served by publication and the bill of review was filed within two years. Nevertheless, a direct attack was made, the jurisdiction

of the juvenile court in the termination proceeding was put in issue, relief was denied, and Joiner did not appeal. That judgment bars the present bill of review under the well-settled rule that a party is bound by an adjudication of the court's jurisdiction in a contested proceeding. RESTATEMENT OF JUDGMENTS §9 (1942).

Under this rule, a Texas court is bound by its own earlier judgment determining an issue of jurisdiction. Farmer v. Saunders, 128 S.W. 941, 942 (Tex. Civ. App. 1910, no writ). The rule is based on the principle that there must be an end to litigation, and when a party has had his day in court with an opportunity to present his evidence and his view of the law, there is no reason to believe that the second decision will be more satisfactory than the first. Stoll v. Gottlieb, 305 U.S. 165, 171-72

(1938). Moreover, judicial power includes the power to make erroneous as well as correct decisions; otherwise a judgment would always be subject to attack on its merits, and litigation would never end.

Under these well-established rules, even though the original termination decree may be void -- or, more properly, voidable -- in the sense that it was rendered without valid service of process, the judgment in the first bill of review is valid and stands as a bar to the present bill of review. No attack on the bill-of-review judgment is made here for lack of jurisdiction over either parties or subject matter in that proceeding. Obviously, if the court had granted relief setting aside the termination decree and restoring Joiner's parental rights, and no appeal had been taken, all parties would have been bound.

If the contrary determination was erroneous for any of the reasons now alleged, Joiner's remedy was to appeal. His right to attack the termination decree died with his failure to appeal from the denial of his first bill of review. See Layton v. Layton, 538 S.W.2d 642, 648 (Tex. Civ. App. - San Antonio 1976, writ ref'd n.r.e.).

Joiner insists that he should not be bound by the judgment denying his first bill of review because he has raised additional issues that were not raised in that proceeding. In particular, he asserts that the best interest of the children is the paramount consideration and their interest has never been determined. Although this argument has a strong appeal, it cannot prevail against the established rules governing the finality of judgments announced by the authorities above cited. Assertion of

additional grounds which, by the use of diligence, might have been tried in an earlier proceeding does not avoid the bar of res judicata. Rizk v. Mayad, 603 S.W.2d 733, 775-76 (Tex. 1980); Ogletree v. Crates, 363 S.W.2d 431, 435 (Tex. 1963). Otherwise a resourceful lawyer could always allege an additional ground and litigation would never end. Since in the first bill of review (or motion for new trial under rule 329) Joiner presented or had the opportunity to present all the facts challenging the jurisdiction of the court rendering the termination decree, as well as facts showing his meritorious defenses, and the court rendered an adverse judgment from which he took no appeal, the trial court properly sustained the plea of res judicata.

Neither can we accept Joiner's premise that established rules governing

finality of judgments do not apply when the interests of minor children are at issue. He argues that so long as no rights of third parties have intervened, as in the case of an adoption, the merits of the termination decree should be subject to review. We cannot agree that the principle of finality of judgments does not apply to children. Rather, it applies to them with a special force, as the supreme court has recognized. Knowles v. Grimes, 437 S.W.2d 816, 817 (Tex. 1969); Ogletree v. Crates, 363 S.W.2d 431, 436 (Tex. 1963). The reason is stated in Ogletree, which involved an allegation that an earlier custody decree was procured by fraud. The supreme court said:

> There may be a technical distinction between a suit to obtain custody and possession of a minor child through modification of a final judgment and a suit to obtain custody and possesssion

> of the child by setting aside a final judgment, but the broad cause of action and the relief sought in both suits are the same. The suit in each instance tests the rights of the parties to custody of the child and the only pertinent inquiry is the best interests of the child. As a matter of public policy there should be a high degree of stability in the home and surroundings of a young child, and, in the absence of materially changed conditions, the disturbing influence of constant re-litigation should be discouraged. Once a final judgment of custody is rendered, a subsequent suit to modify or to avoid the judgment should be res judicata of all causes of action which, with diligence, could have been asserted in the suit as a basis for obtaining custody and possession of the child.

Joiner also argues that the trial court erred in sustaining the plea of res judicata and dismissing his bill of review at a pretrial hearing, rather than on a motion for summary judgment or trial on the merits. He relies on a line of cases which hold that since res judicata is a merit defense which must be supported by

competent evidence, rather than a dilatory plea which may be considered at pretrial under rule 166 of the Texas Rules of Civil Procedure, final disposition upon a plea of res judicata may be had only on motion for summary judgment or trial on the merits. See Kelley v. Bluff Creek Oil Co., 155 Tex. 180, 309 S.W.2d 208 (1958); Phipps v. Miller, 597 S.W.2d 458 (Tex. Civ. App. - Dallas 1980, writ ref'd n.r.e.); Piper v. Estate of Thompson, 546 S.W.2d 243 (Tex. Civ. App. - Houston 1966, no writ). We do not disagree with these authorities, but they have no application here. No further evidence was needed on the plea of res judicata because the record then before the court affirmatively showed that Joiner could not have prevailed on the merits. The conclusive bar of the judgment in the first bill of review is shown by Joiner's own pleading in the third bill of review, which

affirmatively alleges the prior proceeding. Also, the court was required to take judicial notice of its own earlier records, which have been brought forward in our present transcript. Victory v. State, 138 Tex. 285, 158 S.W.2d 760, 763 (1942). Since Joiner's own pleading and records within the court's judicial knowledge affirmatively show that the only question presented was a matter of law, in that no facts could have been shown in a trial on the merits that would prevent the application of the bar of res judicata, we hold that at the time of the pretrial hearing the case was ripe for judgment sustaining the plea of res judicata and denying the relief sought by the bill of review. Ellis v. Woods, 453 S.W.2d 509, 510 (Tex. Civ. App. - El Paso 1970, no writ); Pan American Petroleum Corp. v. Texas Pacific Coal & Oil Co., 340 S.W.2d 548, 554-55 (Tex. Civ. App. - El Paso

1960, writ ref'd n.r.e.).

We need not determine whether Joiner's minor children have a right to attack the termination decree. They were represented by an appointed guardian ad litem in the original termination suit under the authority of section 11.10 TEX. FAM. CODE ANN. (Vernon Supp. 1980-81). The guardian ad litem did not appeal that decree. Neither the children nor the appointed guardian were parties to Joiner's first bill of review. In the present suit the trial court appointed a new guardian ad litem. The new guardian sought no affirmative relief on behalf of the children in the trial court and did not perfect an appeal from the trial court's dismissal of Joiner's bill of review. Before this court, the guardian ad litem has filed a brief advancing the same arguments as those presented by Joiner and urging that Joiner be given

relief by this appeal, but the guardian makes no separate claim for relief on behalf of the children. Since the children did not seek a bill of review of the termination decree by any pleading or evidence offered to the trial court in their own behalf, we limit our consideration to the rights asserted by Joiner. Consequently, this opinion should not be interpreted as holding that any relief sought on behalf of the children would be likewise barred. Neither should it be taken as implying that after a parent has failed in an attack on a termination decree, the children may maintain a separate suit attacking that decree.

Affirmed.

CLARENCE A GUITTARD

CHIEF JUSTICE

PUBLISH

Justice Ted M. Akin dissenting.

COURT OF APPEALS

FIFTH SUPREME JUDICIAL DISTRICT OF TEXAS

AT DALLAS

NO. 20558

WILLIAM HENRY JOINER, JR.

Appellant

VS.

MRS. KAREN H. VASQUEZ,

Appellee

FROM A DISTRICT COURT

OF DALLAS COUNTY, TEXAS

BEFORE THE COURT EN BANC

OPINION BY CHIEF JUSTICE GUITTARD

MARCH 17, 1982

ON MOTION FOR REHEARING

In this motion for rehearing Joiner insists that the rule that a judgment valid on its face is not void and subject

to collateral attack for lack of service does not apply to judgments against nonresidents because of due process requirements. He cites Hodges, "Collateral Attack on Judgments," 41 TEX. L. REV. 499, 505-518 (1963). Professor Hodges points out that due process may require an exception to this rule in the case of nonresidents, but he recognizes that a collateral attack may be barred by the res judicata effect of an intervening judgment. Id. at 526.

Under such an exception, the juvenile court may have erred in the first bill of review, but that error cannot avail in this third bill of review. The termination decree did not reveal on its face any lack of personal jurisdiction. Such as lack was a matter of fact and could only be established by evidence. Joiner undertook to make that proof in his first bill of review, but the court

declined to give him relief on that ground, and he failed to appeal. Although the termination decree may have been void for lack of jurisdiction over his person, the judgment in the first bill of review was not void, since he appeared and invoked the court's jurisdiction to determine whether it had jurisdiction of the termination action. The first bill of review judgment, though possibly erroneous, was valid in the jurisdictional sense, and Joiner's remedy was to appeal. Instead, he brought another bill of review on the same grounds, and, when relief was again denied, he brought a third, although he has never made any proper attack on the judgment in the first bill of review. If unsuccessful again, he may attempt a fourth, and so on, contending each time, as he does here, that no binding judgment can be rendered until he is finally heard on the merits of the original termination

action.

None of the authorities cited tend, even remotely, to support such a contention. The issue of service of process, like any other issue of fact, may be settled by a judgment in a contested proceeding under the principle stated in RESTATEMENT OF JUDGMENTS Section 9 (1941) that a party is bound by an adjudication of the court's jurisdiction in a contested proceeding. The application of this principle to nonresidents is illustrated by authorities holding that Texas courts are bound by determinations of personal jurisdiction by foreign courts in cases where Texas residents have appeared in the foreign court and contested jurisdiction. Moody v. First National Bank of Dona Ana County, 530 S.W2d 879, 881-82 (Tex. Civ. App. - Houston [1st Dist.] 1975, writ ref'd n.r.e), following Dunfee v. Duke, 375 U.S. 106 (1963). The same rule has

been applied to a jurisdictional determination by a foreign court in proceedings concerning the support and custody of children. Kellogg v. Kellogg, 559 S.W.2d 126, 128 (Tex. Civ. App. - Texarkana 1977, no writ); Layton v. Layton, 538 S.W.2d 642, 647-48 (Tex. Civ. App. - San Antonio 1976, writ ref'd n.r.e.). If a Texas court is bound by such a jurisdictional determination of a foreign court, then, on the same principle a Texas court is bound by its own determination of jurisdiction in an earlier proceeding in which the nonresident appeared and contested the jurisdiction of the Texas court.

We do not hold that a nonresident defendant is bound by the recitals of service in a judgment and cannot attack it by extrinsic evidence showing lack of proper service. We do hold that having made an attack on that ground and failed,

he may not make another.

Joiner seeks to avoid the bar of res judicata on the ground that the present proceeding is a collateral as well as a direct attack on the termination decree. He gains nothing by labeling the proceeding a collateral attack. Res judicata applies whether the earlier attack was direct or collateral. (See McGhee v. Romatka, 92 Tex. 38, 45 S.W. 552, 554 (Tex. Crim. App. 1898) (collateral attack following direct attack); Cheney v. Norton, 181 S.W.2d 835, 836 (Tex. Civ. App. - Dallas 1944, writ ref'd) (collateral attack following bill of review treated as collateral attack for want of necessary parties); "56" Petroleum Corp. v. Rodden, 98 S.W.2d 269, 270 (Tex. Civ. App. - Texarkana 1936, no writ) (direct attack following collateral attack). In McGhee v. Romatka, supra, the supreme court held that a collateral

attack in a subsequent suit for title to land was barred by the denial in the former suit of a motion for new trial alleging the same ground subsequently alleged. The court commented that if the earlier decision was erroneous, the losing party should have had it set aside.

We know of no ground for avoiding a judgment that may be urged by collateral attack but not by direct attack. When the ground for avoiding the earlier judgment is lack of service of process, the party seeking relief need not show, as in the usual bill of review, that he was prevented from making his defense to the original suit by fraud, accident, or wrongful act of the opposing party. Texas Industries, Inc. v. Sanchez, 525 S.W.2d 870, 871 (Tex. 1975). We need not determine whether Joiner was required in the first bill of review to prove a meritorious defense to the termination

suit because even if the court erred in requiring him to do so, he is bound by the judgment denying the bill of review, since he made no effort to set that judgment aside by appeal. McGhee v. Romatka, supra. Consequently, we hold that the judgment in the first bill of review is a conclusive bar to the present suit.

We are not justified in disregarding these established principles on the ground that errors in the original termination suit and in the first bill of review will have an adverse effect on the welfare of the children. If final judgments are subject to review in subsequent proceedings on issues relating to the merits, but not specifically decided in the original suit, then lititation would never end until every new theory of fact and law advanced by resourceful counsel or his successor is fully explored and expressly determined. Although

occasionally ideal justice may be more nearly attained as the result of a second trial, we must assume that in the great majority of cases the original judgment is proper and that subsequent proceedings would impose an intolerable burden of meritless litigation. The doctrine of res judicata, therefore, is not a mere rule of convenience that may be disregarded on later proof that justice was not done.

These principles apply with particular force to decrees terminating parental rights. Finality is even more important for a termination decree, which is intended to be final, than to a custody order, such as that in Ogletree v. Crates, 363 S.W.2d 431 (Tex. 1963), which is subject to modification. If a termination decree may be reviewed on the ground that the merits were never finally decided because the interests of the children were not properly considered, then innumerable

termination decrees would be subject to similar attacks. Although we may assume that most such attacks would fail, nevertheless, the unavailability of a plea of res judicata to cut short such attacks would cause incalculable burdens and misery for both parents and children. Consequently, we cannot be swayed by emotionally appealing arguments that such decrees fall into a special category to which the usual principles of finality of judgments do not apply. We adhere to the views stated in our original opinion.

The motion for rehearing is overruled.

CLARENCE A GUITTARD

CHIEF JUSTICE

PUBLISH

CONCURRING: Justices Robertson, Carver, Storey, Sparling, Vance, Fish, Allen and Whitman

DISSENTING: Justices Akin, Stephens and Guillot

COURT OF APPEALS

FIFTH SUPREME JUDICIAL DISTRICT OF TEXAS

AT DALLAS

NO. 20558

WILLIAM HENRY JOINER, JR.

Appellant

VS.

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Appellee

FROM A DISTRICT COURT

OF DALLAS COUNTY, TEXAS

BEFORE THE COURT EN BANC

DISSENTING OPINION BY JUSTICE AKIN

MARCH 17, 1982

I cannot agree that res judicata, an equitable doctrine, should bar the present suit to set aside a void judgment of termination of the parental rights of the father. Neither can I agree with the

majority that, in a termination case, the policy of finality of judgments should prevail over the policy, ennunicated by the legislature in the Texas Family Code, that the best interests of the children should be paramount in any suit affecting the parent-child relationship. In this respect, at no hearing have the interests of the children been considered, except at a hearing in 1980, in which the evidence showed that termination was not in the children's best interest, but the visitation order predicated on this hearing was aborted by the trial judge on the ground of res judicata. At the very least, the appeal of the children's guardian ad litem should be sustained and this cause remanded. The facts as reflected by the record indicate that an appalling miscarriage of justice has occurred and will be perpetuated unless an evidentiary hearing is had with respect to

the best interest of the children and a ruling had based on the merits. Consequently, I am compelled to dissent.

This action commenced on February 10, 1976, when Mrs. Vasquez, then Mrs. Stephens, filed a suit to terminate Joiner's[1]

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[1] Joiner was the first of Mrs. Vasquez' four husbands.

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parental rights. Mrs. Vasquez and Joiner were divorced in Oklahoma in 1971. That court awarded custody of the couple's two children to Mrs. Vasquez, with Joiner having reasonable visitation, and ordered Joiner to pay reasonable child support. In her original petition, Mrs. Vasquez sought termination on the ground that Joiner failed to pay court-ordered child support. An attempt was made to serve citation upon Joiner in Oklahoma, where he

was a resident, but the citation was returned unexecuted on March 9, 1976. Mrs. Vasquez' counsel then filed an affidavit for citation by publication and, thereafter, service was attempted by publication. On May 18, 1976, a trial was had before the first judge,[2]

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[2] The judge who presided over the original proceedings was not the present trial judge.

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at which Joiner was represented by court-appointed counsel, who neither filed an answer nor otherwise actively participated at trial; the only evidence tendered was the testimony of Mrs. Vasquez and Greg Stephens, her husband at the time of the trial. Mrs. Vasquez testified that her male child by Joiner was currently in Joiner's custody because her second husband (yet another man) had taken the child from her home to Joiner & that she

believed that termination would be in the best interests of her children. Stephens testified that he had been in contact with Joiner's parents and had attempted to locate Joiner but was unable so to do. At the conclusion of the testimony, the trial judge stated that because Joiner had physical custody and was supporting his son, the court would not terminate Joiner's parental rights on the ground of nonsupport. However, no order was entered reflecting this decision. On June 2, 1976, Mrs. Vasquez amended her petition to allege that Joiner had endangered the physical and emotional well-being of the male child. No attempt was made to serve Joiner with this amended petition, nor was a hearing held or evidence presented to support termination on this ground. Indeed, the judge rendered a Decree of Termination on June 3, 1976, which found that (1) the court had jurisdiction over

the parties and subject matter and that no other court had continuing jurisdiction; (2) Joiner was guilty of nonsupport as to both children; (3) Joiner had placed "the child" (inferably the male child) in dangerous conditions; (4) termination was in the children's best interests; and (5) Mrs. Vasquez should be appointed as the children's managing conservator.

Thus, the trial judge rendered her decree without inquiring into the children's best interests, without inquiring into the diligence used in attempting to serve Joiner with the original petition as required by TEX. R. CIV. P. 109, without preparing a statement of evidence as required by TEX. R. CIV. P. 244 and 812, without any attempt to serve Joiner with notice of Mrs. Vasquez' trial amendment, without any findings as to the court's ground for asserting jurisdiction over Joiner, without any pleadings to

support the appointment of Mrs. Vasquez as the children's managing conservator and despite the fact that the court hd previously declined to terminate Joiner's rights as to the male child on the ground of nonsupport.

On February 24, 1977, Joiner filed a petition in the trial court entitled "Motion for Bill of Review." At a hearing thereon, before Judge Penfold, the second judge involved here, Joiner presented testimony attempting to show that Mrs. Vasquez failed to use diligence in attempting to serve him with citation. Although Joiner's petition should have been considered a motion for new trial pursuant to TEX. R. CIV. P. 329, the trial judge treated it instead as a bill of review. Under rule 329, the court should have granted Joiner a new trial based upon the testimony presented, but because the trial judge mistakenly treated the

petition as a bill of review, he required Joiner to establish that he had a meritorious defense as well, upon which no evidence was presented. Thus, he denied Joiner's petition, although he found that Mrs. Vasquez had perpetrated a fraud on the court, that failing to answer was not Joiner's fault, and that no other remedy existed. Although Judge Penfold stated that this was the worst record of any termination case he had ever heard & that Mrs. Vasquez had perpetrated a fraud on the court, he incorrectly believed that he was precluded from granting relief because Joiner had not established a meritorious defense with respect to Mrs. Vasquez' amended petition in the first action. Joiner's failure to appeal this order is the grounds upon which the majority invokes the doctrine of res judicata to preclude this matter. Thus, this tragedy for these children has been perpetuated.

Joiner did not appeal the denial of his motion, but instead, under the apparent theory that the trial court had continuing jurisdiction, filed a second bill of review five days after the first bill of review was denied. On March 7, 1978, the trial court denied the second bill of review without a hearing based upon the res judicata effect of the first bill of review. No appeal was taken from this order.

Subsequent to the first two petitions designated as bills of review, Mrs. Vasquez entered into a contract with Joiner, whereby Joiner would pay her certain sums of money in exchange for permitting him regular weekend possession of the children and further that Mrs. Vasquez would consent to Joiner's adoption of his children. Pursuant to this contract, visitation was implemented by Joiner seeing the children regularly until

Mrs. Vasquez again changed her mind and severed contact between Joiner and his children before she had permitted an adoption to take place.[3]

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[3] This information was attached to a motion by Joiner to supplement the transcript, which motion was denied on September 3, 1980, by a panel of this court (including the author of the majority opinion but not the dissenter on the ground that the information was immaterial to a resolution of this case).

Thereafter, Joiner's parents filed a petition in the old termination suit, seeking grandparent visitation rights with their grandchildren and, on October 29, 1979, the trial judge signed an agreed temporary order[4]

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[4] This order was agreed to by Mrs. Vasquez and Joiner, thus tending to negate her original contention that Joiner placed

his son in "dangerous circumstances." Indeed, no evidence has ever been presented to any judge supporting this allegation.

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appointing Joiner and his parents as temporary possessory conservators of the children and giving Joiner visitation rights.[5]

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[5] Apparently, Judge Penfold believed he had continuing jurisdiction of the parent-child relationship.

On February 8 and 27, 1980, the trial judge conducted a hearing to determine whether the agreed temporary orders should be extended. Although the court-appointed psychologist testified at the hearing that it would be in the best interests of the children for Joiner to have a permanent relationship with his children, the trial judge refused to extend the temporary order

on the ground of res judicata asserted by Mrs. Vasquez, who had obviously again changed her mind.

On January 3, 1980, after retaining new counsel, Joiner filed a third bill of review. Without a hearing, the trial judge again denied the petition on the ground of res judicata. From this bill of review, Joiner has now appealed to this court. Thus, from the time of the original termination proceeding in 1976 through the third bill of review, the best interest of the children was considered in only one instance, the hearing on a continuation of the agreed temporary order in 1980, at which no evidence was adduced supporting termination but instead all of the evidence showed that the best interest of the children would be served by permitting the children to visit and to continue their

relationship with their father. Indeed, the psychologist testified that both children were emotionally disturbed by lack of association with their father and could be permanently scarred emotionally because both had been told by their mother that Joiner did not want to have anything to do with them. Consequently, both felt rejected by their father. Extraordinarily, this situation persists although Joiner has been engaged for over six years in a vain attempt to be able to retain a parental relationship with his children. Indeed, his efforts have been remarkable and commendable in this respect.

Unlike the majority, I cannot agree that an appellate court is impotent to act to rectify the tragedy of errors which has dogged and precluded a

consideration of the best interests of these children. Needless to say, the doctrine of res judicata should not be employed by the trial court and this court to bar a consideration of what is in the children's best interest. The question presented is actually one of policy, i.e. should the policy behind finality of judgments prevail over the policy of the Texas Family Code decreeing that where children are concerned their best interest should be the paramount concern of the court?

With respect to res judicata, we noted in Gilbert v. Fireside Enterprises, Inc., 611 S.W.2d 869, 877 (Tex. Civ. App. - Dallas 1980, no writ), that the supreme court has held that where the matter had not been actually litigated, the question of whether causes of action which could have been litigated, but were not, would not invoke application of the harsh

doctrine of res judicata to bar further litigation unless compelling public policy considerations would be substantially offended by the new action before it is precluded by res judicata. Westinghouse Credit Corp. v. Knownslar, 496 S.W.2d 531, 532 (Tex. 1973). Here no compelling policy considerations are offended by reversing this denial of the bill of review and by permitting a determination on the merits of what is in the best interest of the children. To the contrary, the majority, as well as the trial court, uses the doctrine of res judicata to preclude a consideration of the best interest of the children, which in my view is untenable.

In Kownslar, the supreme court stated that, in determining whether, as a matter of policy, res judicata should apply to bar a second action, a court must look first to whether there is a Texas

case directly in point, and if not, whether some substantial policy consideration would be offended. Id. at 532. Here, no Texas case is directly in point and neither is any substantial policy consideration offended. Indeed, the contrary is true. In the Interest of G.M., 596 S.W.2d 846, 847 (Tex. 1980), the supreme court, in holding that a clear and convincing proof standard was required in termination cases, noted that "termination is a drastic remedy and is of such weight and gravity" that due process required a burden of proof greater than a preponderence of the evidence in involuntary termination cases. In light of the supreme court's strong expression with respect to the proof required in an involuntary termination case, I cannot believe that the supreme court would endorse application of the doctrine of res judicata to preclude a full hearing to

determine the best interest of children in a termination case, especially in a case such as this where no evidence to support the termination decree has ever been adduced.

Neither does the supreme court decision on Ogletree v. Crates, 363 S.W.2d 431 (Tex. 1963), relied upon by the majority, support their decision. Ogletree concerned custody of children rather than termination of parental rights. Different considerations are applicable to a termination case where the judgment of the court, even though erroneous, is final, as opposed to a custody dispute where the order of the court is subject to further review by the trial court at a later date based upon changed conditions as to the children. In a custody case, if a mistake is made with respect to the best interest of children, the trial court has continuing

jurisdiction to rectify that mistake if the circumstances of the children so justify. On the contrary, in a termination case, such as here, the judgment is final for eternity, even though the children may suffer in the sole custody of their mother, in addition to being deprived of a relationship with their father. Indeed, if her circumstances continue as shown here, the children may need the intervention of their father, which would be precluded by the majority's decision. See Durham v. Barrow, 600 S.W.2d 756 (Tex. 1980). Consequently, Ogletree is not precedent to support the conclusion of the majority, which if left to stand, precludes forever the relationship between a father and his children, which a court appointed expert concluded was not in the children's best interest. Indeed, Ogletree is inapposite to the majority's holding because that

court considered the best interest of the children in determining, as a matter of policy, to utilize res judicata to preclude further custody litigation at that time.

Moreover, we have held in C__ v C__ 534 S.W.2d 359 (Tex. Civ. App. - Dallas 1976, no writ) that the best interest of children is the primary concern of the court and that the ordinary procedural rules restricting the granting of a new trial should not be strictly adhered to by the trial court where the best interest of children is concerned. Likewise, the rationale of C__ v. C__ should apply here and we should hold that the best interest of children should not be precluded by the policy behind finality of judgments, especially in a termination suit such as here.

Furthermore, the majority refuses to consider the merits of the minor

children's attack on the termination decree because the children's guardian ad litem did not seek a bill of review by pleading in the trial court and did not appeal the dismissal of Joiner's third bill of review. The majority concludes that because the guardian ad litem sought no affirmative relief in the trial court, the children are precluded forever from relief, apart from their father, in this court. With this I cannot agree.

The primary purpose in appointing a guardian ad litem is to insure that the interests of the minor children are protected. In the trial court, the guardian ad litem did not need to join in Joiner's pleading nor offer any evidence because the trial judge had the entire record of all the prior proceedings before him, as well as Joiner's contentions in which the children now join on appeal. All of Joiner's contentions on this appeal

have been considered by the trial judge in the various hearings. In none of these proceedings was the best interest of the children considered, except in a hearing in 1980 in which the interest of the children was considered, and where the evidence showed that Joiner's parental rights should not be terminated. Under the rationale of C__ v. C__, this evidence was so compelling so as to require the trial judge to hold a full evidentiary hearing, with all parties present, to present, and to consider, evidence on what was in the best interest of the children and to make a decision ~~on the children's~~ best interests on that evidence.

Likewise, under the rationale of C__ v. C__, this court should consider the merits of the children's claim apart from Joiner's parental rights, because the children are the real parties in interest. The guardian ad litem has joined Joiner in

seeking a new trial so that the best interest of the children can be determined, which should be the primary concern of this court, as well as of the trial court. The law requires a court to consider the best interest of the children in a termination case and a guardian ad litem is appointed to insure that those interests are in fact protected. The majority's position precludes us from considering the guardian ad litem's appeal in behalf of the children because, although presented to the trial judge by Joiner, the guardian did not adopt Joiner's pleadings in the trial court. With this I cannot agree because the guardian ad litem is charged with protecting the children's interests, both in the trial court and in this court. The majority is again using a technical procedural rule, of doubtful application in this termination suit, to preclude a

hearing of that which is in the children's best interest.

Neither can I agree with the majority's assertion that their opinion does not bar forever the children's rights because a guardian ad litem's representation is limited to matters related to the suit for which he was appointed. Durham v. Barrow, 600 S.W.2d 756, 761 (Tex. 1980). Just as Joiner, the guardian appointed here would be barred by res judicata to bring another bill of review on behalf of the children under the majority's rationale. Likewise, Joiner would lack standing to bring a bill of review, as next friend of the children, because his parental rights have been terminated. Id. at 760. Thus, under the majority's holding, the judiciary is forever rendered impotent to rectify this travesty of justice for these children. Small wonder that the judiciary has been

held up to ridicule by laymen.

Faced with the plethora of judicial errors replete in this case, the majority's observation, with respect to the first and second bills of review, that "judicial power includes the power to make erroneous as well as correct decision" is small comfort to a father denied contact with his children and to the children for whom no evidentiary hearing has been had nor ruled upon by any judge with respect to what is in their best interest. Instead, the majority's rationale is but another judicial reason to frustrate the overriding public policy of determining that which is in the best interest of children in favor of procedural technicalities.

The majority places great emphasis on whether the termination decree in 1976 was void or voidable. In my view, the original decree is void for lack of

jurisdiction over Joiner, which was clearly established on the first "bill of review" hearing. Additionally, it is void because the petition upon which termination was decreed was not even attempted to be served upon Joiner even by publication. Indeed, no attempted service was had nor was a hearing had upon the amended pleading. I would suggest that, even more importantly, the judgment is void because the trial court simply lacked the jurisidictional power to render an order purporting to be in the children's best interest, when their best interest had not been considered. See Hodges, "Collateral Atacks on Judgment," 41 TEX. L. REV. 499 (1963).

Although the original decree of termination was unquestionably void, our question is whether subsequent unsuccessful attacks upon it in the trial court can impart validity to that void

decree. To support its conclusion in holding that it does, the majority relies upon the denial of the first bill of review to breathe life into a void judgment on the basis of the failure of Joiner to appeal! This conclusion is predicated upon res judicata, a species of estoppel. Estoppel, of course, is based upon equitable principles, which should not be employed to uphold a void termination judgment procured by fraud upon the trial court. See First State Bank & Trust Co. v. Overshiner, 198 S.W. 979 (Tex. Civ. App. - El Paso 1917, no writ) ("the trial court has the authority to set aside a judgment which is a nullity, notwithstanding it has been affirmed upon appeal"). See also Evans v. Young County Lumber Co., 368 S.W.2d 783, 786 (Tex. Civ. App. - Ft. Worth 1963, writ dism'd) (a void judgment "may be collaterally attacked in any court at any

time, including a time after appeal is perfected"). It appears to be that a void judgment in a termination suit is subject to attack at any time in any court, Fulton v. Finch, 162 Tex. 351, 346 S.W.2d 823, 827 (1961); Commander v. Bryan, 123 S.W.2d 1008 (Tex. Civ. App. - Ft. Worth 1938, no writ). See also Ruby v. Davis, 277 S.W. 430 (Tex. Civ. App. - Amarillo 1925, no writ), and that the equitable doctrine of res judicata, based on the public policy with respect to finality of judgments, should not be utilized as a reason for precluding a hearing and a ruling on whether the parental rights of Joiner should be terminated, considering the children's best interest. See Ogletree v. Cates, supra., see also Gilbert v. Fireside Enterprises, Inc., supra.

In conclusion, I cannot join in a decision that places the policy concerning finality of judgments over the policy of

considering the best interest of children in a termination case. Accordingly, I am compelled to dissent in this tragedy of judicial errors. This case cries out for justice for these children to be determined in a evidentiary hearing and ruled upon by the evidence presented. My view is particularly compelled by the constitutional constraints placed upon termination of parental rights by the United States Supreme Court and the Texas Supreme Court. Stanley v. Illinois 405 U.S. 645, 92 S.Ct. 1208, 31 L.Ed. 2d 551 (1972); Wiley v. Spratlan, 543 S.W.2d 349 (Tex. 1976).

TED M. AKIN

JUSTICE

Publish

Concurring in Justice Akin's opinion:

Justice P. C. Guillot

COURT OF APPEALS

FIFTH SUPREME JUDICIAL DISTRICT OF TEXAS

AT DALLAS

NO. 20558

WILLIAM HENRY JOINER, JR.

Appellant

VS.

MRS. KAREN H. VASQUEZ,

Appellee

FROM A DISTRICT COURT

OF DALLAS COUNTY, TEXAS

BEFORE THE COURT EN BANC

DISSENTING OPINION BY JUSTICE GUILLOT

MARCH 17, 1982

While I agree with the result reached in Justice Akin's dissent, I believe the compelling reasons for reversing and remanding this case are constitutional.

At the outset this court should be cognizant of the constitutional right of family integrity. The State's severance of a parent-child relationship must receive strict judicial scrutiny. Roe v. Conn, 417 F. Supp. 769 (M.D. Ala. 1976).

While many of the decisions dealing with the constitutional issues raised in parent-child proceedings deal with the rights of parents, nevertheless, the reasoning in those cases applies to children as well. In Stanley v. Illinois, 405 U.S. 645 (1972), the United States Supreme Court held that a father had a constitutional right to a hearing before the State could take his children from him. I would hold the reverse is also true: children have a right to a hearing before one of their parents is taken from them. It is undisputed in this case that no such hearing took place.

The rights of juveniles have been

protected in delinquency hearings. In re Gault, 387 U.S. 1 (1967). Gault held that a minor is entitled to, among other things:

(a) right to notice;
(b) right to counsel;
(c) right to confrontation and cross-examination; and
(d) right to a transcript of the proceedings.

I would apply these rights to minors who are subject to losing either of their parents. Testing the record vis-a-vis Gault with respect to notice, it reflects no notice of the amended pleadings was given to the children; with respect to right to counsel, there is no evidence that the court-appointed attorney served the children's behalf between May 18, 1976, and the final motion for rehearing some four years later;[1] with respect to

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[1]At the first hearing the court refused to terminate.

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the right to confrontation and to a transcript of the proceedings, the record reflects no hearing was ever had on the amended pleadings.

Furthermore, the failure to serve amended pleadings on the children is not only constitutionally defective, it has long been the law that if an amended pleading asserts a new cause of action, service of process is necessary. Morrison v. Walker, 22 Tx. 18 (1858); Sanchez v. Texas Industries, Inc., 485 S.W. 2d 385 (Tex. Civ. App. - Waco 1972, writ ref. n.r.e.). There is no doubt that the real parties in interest in this case are the children. See C. V. C., 534 S.W.2d 359 (Tex. Civ. App. - Dallas 1976, no writ). It necessarily follows that the amended pleadings should have been served on them.

Moreover, papers should have been served on the children because they are persons needed for just adjudication.

See Rule 39 Tex. R. Civ. P. 39.

In addition to being recognized in the federal court system, the constitutional rights of children are recognized in the State system also. See Ricketts v. Ricketts, 576 S.W.2d 932 (Ark. 1979, en banc). I would hold that the children in the present case have a constitutional right to a termination hearing at which they may adduce evidence, examine witnesses, and conduct the trial in such a manner as to assist the trier of fact to determine what is in their best interest.

PATRICK C. GUILLOT

JUSTICE

PUBLISH

Concurring in Justice Guillot's opinion:

Justices T. M. Akin and B. J. Stephens

JUDGMENT OF THE COURT OF APPEALS
OF TEXAS FOR THE FIFTH SUPREME
JUDICIAL DISTRICT
DECEMBER 11, 1981

NO. 20558

WILLIAM HENRY JOINER, JR.

Appellant

VS.

MRS. KAREN H. VASQUEZ,

Appellee

FROM A DISTRICT COURT

OF DALLAS COUNTY, TEXAS

FRIDAY, DECEMBER 11, 1981

BEFORE CHIEF JUSTICE GUITTARD AND
JUSTICES AKIN AND CARVER
OPINION BY CHIEF JUSTICE GUITTARD

This cause came on to be heard on the transcript of the record, and the same being inspected, because it is the opinion of the Court that there was no error in the judgment, it is therefore considered,

adjudged and ordered that the judgment of the court below be in all things affirmed; that the appellee Mrs. Karen H. Vasquez, have and recover of and from the appellant, William Henry Joiner, Jr. and from the cash deposit in the hands of the District Clerk of Dallas county, Texas, made in lieu of an appeal bond, all costs in this behalf incurred or expended for which execution may issue, and that this decision be certified below for observance.

PUBLISH

Justice Akin Dissents (opinion to follow)

ORDER OF THE COURT OF APPEALS
OF TEXAS FOR THE FIFTH SUPREME
JUDICIAL DISTRICT
OVERRULING APPELLANT'S MOTION
FOR REHEARING,
MARCH 17, 1982

NO. 20558

WILLIAM HENRY JOINER, JR.

Appellant

VS.

MRS. KAREN H. VASQUEZ,

Appellee

FROM A DISTRICT COURT

OF DALLAS COUNTY, TEXAS

WEDNESDAY, MARCH 17, 1982

BEFORE THE COURT EN BANC
OPINION BY CHIEF JUSTICE GUITTARD

This day came on to be heard appellant's motion for rehearing in the above cause, and the same being inspected, it is therefore considered, adjudged and

ordered that the motion be and the same is hereby overruled.

DISSENTING OPINION BY GUILLOT, J. WITH AKIN, J. & STEPHENS, J. CONCURRING.

DISSENTING OPINION BY AKIN, J. WITH GUILLOT, J. CONCURRING.

RECORD OF ORDER OF THE COURT OF APPEALS OF TEXAS FOR THE FIFTH SUPREME JUDICIAL DISTRICT OVERRULING APPELLANT'S SECOND AMENDED MOTION FOR REHEARING, APRIL 30, 1982*

On this the 30th day of April, 1982, the Court overruled the following motions:

20558 William Henry Joiner, Jr. v. Mrs. Karen H. Vasquez

APPELLANT'S SECOND AMENDED MOTION FOR REHEARING

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*The court of appeals no longer issues separate orders overruling motions for rehearing.

ORDER OF THE SUPREME COURT OF TEXAS
REFUSING PETITIONER'S APPLICATION FOR
WRIT OF ERROR AS PRESENTING NO
REVERSIBLE ERROR,
JANUARY 26, 1983

IN THE SUPREME COURT OF TEXAS
C-1325
WILLIAM HENRY JOINER, JR.
VS.
MRS. KAREN H. VASQUEZ,
January 26, 1983
From Dallas County Fifth District

Application of petitioner for writ of error to the Court of Appeals for the Fifth Supreme Judicial District having been duly considered, and the Court having determined that the application presents no error requiring reversal of the judgment of the Court of Appeals, it is ordered that said application be, and hereby is, refused. (Justice Robertson not sitting).

It is further ordered that applicant William Henry Joiner, Jr., pay all costs incurred on this application.

ORDER OF THE SUPREME COURT OF TEXAS
OVERRULING PETITIONER'S MOTION
FOR REHEARING,
MARCH 9, 1983

IN THE SUPREME COURT OF TEXAS
C-1325
WILLIAM HENRY JOINER, JR.
VS.
MRS. KAREN H. VASQUEZ,
March 9, 1983
From Dallas County Fifth District

Petitioner's motion for reheraing for application for writ of error having been duly considered, it is ordered that said motion be, and hereby is, overruled. (Justice Robertson not sitting).

IN THE INTEREST OF	IN THE 304TH
REBECCA LEIGH JOINER AND WILLIAM BARTLEY JOINER, Children	DISTRICT COURT DALLAS

FIRST AMENDED PETITION FOR BILL OF REVIEW

COMES NOW WILLIAM HENRY JOINER, JR. Petitioner in the above-styled and numbered cause and files this his First Amended Petition for Bill of Review seeking review of a judgment previously rendered by the Court, and in support thereof, Petitioner would show the Court:

I.

Respondent is KAREN H. VASQUEZ, who resides at 2809 Robin Hill Lane, Garland, Texas, where she may be served with process.

II.

On February 11, 1976, Respondent herein filed a petition seeking

termination of the parent-child relationship between Petitioner and his minor children, Rebecca Leigh Joiner and William Bartley Joiner. Said petition was filed in the Juvenile Court of Dallas County, Texas, and was entitled and numbered "In the Interest of Rebecca Leigh Joiner, William Bartley Joiner Children, No. 76-165-JUV.

III.

Citation in the above-described termination suit was not effectuated by personal service. Petitioner had no knowledge of the suit nor of hearing on May 18, 1976. Hence, Petitioner made no appearance in the termination proceeding, and no answer to the petition seeking termination was filed on Petitioner's behalf.

IV.

The original petition filed in connection with the termination of the

parent-child relationship between Petitioner and his children alleged as grounds for termination that Petitioner had failed to support the children and that termination was in the children's best interest. The cause was heard on May 18, 1976, at which time the court refused to base its termination decree as to the minor child William Bartley Joiner on the ground of nonsupport. Thereafter, Respondent filed a trial amendment on June 2, 1976, amending the grounds for termination as to Petitioner's son and alleging that the child had been placed in conditions dangerous to his physical and emotional well-being. A Decree of Termination was granted on June 3, 1976, terminating Petitioner's parental rights to both children on the ground of nonsupport, and further noted that Petitioner was being terminated as to his son on the additional ground of having

placed the child in conditions dangerous to his physical and emotional well-being, a copy of which decree is attached hereto, marked Exhibit "A", and made a part hereof by reference for all purposes.

V.

Petitioner brought a Motion for Bill of Review on February 24, 1977, which was denied by judgment of September 22, 1977. This first Motion for Bill of Review was, pursuant to Rule 329, Texas Rules of Civil Procedure, Petitioner's motion for new trial, brought within two years' from the date of entry of the Decree of Termination, a principal well-established in Texas case law.

Petitioner brought a second Motion for Bill of Review, which was denied by Order of March 7, 1978, on the basis of Respondent's Plea in Bar and Motion to Dismiss which, erroneously, relied on the

defense of res judicata. Dismissal of the second Motion for Bill of Review, was clearly judicial error.

Petitioner has never been afforded hearing on any equitable Bill of Review, and thus the Court should grant Petitioner hearing on this First Amended Petition for Bill of Review.

Petitioner would further show that the defense of res judicata is not applicable to jurisdictional questions and that this Petition can not be dismissed on those grounds.

VI.

The Decree of Termination rendered in the above-described termination suit should be declared void fo the reason that this Court was without jurisdiction to render a judgment against the person of Petitioner, for the following reasons:

A. An attempt was allegedly made to

serve Petitioner, a nonresident, pursuant to Rule 108, Texas Rules of Civil Procedure, by forwarding a citation to the sheriff of Oklahoma County, Oklahoma, for personal service upon Petitioner. Subsequently, service was attempted through publication. Rule 109, Texas Rules of Civil Procedure, provides for citation by publication of an nonresident, provided "that the party applying for the citation has attempted to obtain personal service of nonresident notice as provided for in Rule 108, but has been unable to do so." Rule 108, Texas Rules of Civil Procedure, provides for citation of a nonresident, and stated that "the return of service in such cases shall be endorsed on or attached to the original notice, and shall be in the form provided in Rule 107." Rule 107, Texas Rules of Civil Procedure provides: "When the officer has not served the citation,

the return shall show the diligence used by the officer to execute the same and the cause of failure to execute it, and where the defendant is to be found, if he can ascertain." Petitioner would show the Court that the return of citation on file in cause number 76-165-JUV merely states: "William Henry Joiner, Jr. unavailable to contact", a copy of which return is attached hereto as Exhibit "B", and incorporated herein for all purposes. Clearly, this return fails to meet the requirements of Rule 107, because of its failure to show the diligence used by the officer to execute the citation. Petitioner would show the Court that the subsequent Citation by Publication is void.

Petitioner would further show the Court that, in order to sustain a judgment upon substituted service, there must be affirmative proof in the record

that the defendant was served in the manner required by law. No presumption should be indulged to aid the return in order to support the judgment. Petitioner would show that this Court lacked in personam jurisdiction over Petitioner, and that the Decree of Termination is void and should be so declared. Petitioner requests that the Court declare the Decree of Termination entered June 3, 1976, void for want of jurisdiction.

B. The Decree of Termination should be declared void because the attorney ad litem appointed by the Court to represent Petitioner did not file any answer on behalf of Petitioner. Because no answer was filed, the Decree of Termination is a default judgment. Rule 812, Texas Rules of Civil Procedure specifically prohibits entry of default judgments in a case where service has been had by

publication.

C. The Decree of Termination should be declared void because no Statement of the Evidence was filed in the termination suit, as required by Rules 224 and 812, Texas Rules of Civil Procedure. Rule 244 provides, in part, "in every such case a statement of the evidence, approved and signed by the judge, shall be filed with the papers of the cause as a part of the record thereof."

D. The Decree of Termination should be declared void because Respondent was denied his right to due process, inasmuch as Respondent failed to use the best method possible to apprise Petitioner of the termination proceedings. Petitioner would show the Court that Respondent admitted that she was aware of the residences and whereabouts of Petitioner's parents and Petitioner's sister, and submits that citation by

substituted service would have been the method of service most likely to apprise Petitioner of the action against him.

E. The Decree of Termination should be declared void because it is contitutionally invalid, Petitioner having been denied his constitutional right to due process.

F. The Decree of Termination should be declared void because Section 11.09 of the Texas Family Code is unconstitutional. Petitioner would show that Rule 116, Texas Rules of Civil Procedure requires that a citation by publication be published once a week for four consecutive weeks, and Rule 114 provides that the party being so cited shall have not less than 42 days in which to answer. Section 11.09, Texas Family Code, requires publication of citation only one time, and permits only approximately 20 days for answer.

Petitioner would show that a person being cited in a judicial proceeding intended to deprive such person of all his parental rights should be entitled to the minimum due process afforded respondents in other civil suits in Texas, and Section 11.09 of the Texas Family Code should be declared unconstitutional.

VII.

Pleading in the alternative, without waiving the foregoing, the Decree of Termination in the above-described case should be set aside for the reason that Petitioner's failure to appear and answer was due only to the fact that he received no notice of the suit and not any negligence on his part. Petitioner submits that where there is a duty to act there cannot be negligence by inaction. Rather, Petitioner would show the Court that he was compelled to suffer the

Decree of Termination by circumstances beyond his control, that he has not been guilty of a lack of diligence in failing to avail himself of any mean to obtain relief therefrom, and that no other remedy is available to him.

VIII.

Petitioner herein had and has a good and meritorious defense to the above-described termination suit that was not presented in the termination proceedings only because Petitioner had no notice of said proceedings and hence, made no appearance therein. Petitioner submits, by way of meritorious defense the following:

A. Petitioner did not fail to support said children in accordance with his ability during a period of one year ending within six months of the date of the filing of the Petition for Termination, upon which grounds the

Decree of Termination was predicated. Petitioner had physical possession of the child William Bartley Joiner during the said one year period and contributed one hundred percent of this child's support. In fact, it was the Respondent who, during the described period, failed to support the child William Bartley Joiner in accordance with her ability. The Court expressly questioned the validity of Respondent's allegation, as indicated on page thirteen of the transcript of the termination proceedings, a copy of which relevant pages of the Statement of Facts is attached herein as Exhibit "C", incorporated herein for all purposes.

B. Petitioner did not place the child, William Bartley Joiner, in conditions which endangered the child's physical or emotional well-being. Rather, the facts would show that while in the possession of Petitioner, the

child's physical and emotional well-being were extended proper attention and care, and that the child was taken into the possession of Petitioner only on order to protect the child from the neglect of Respondent. Petitioner would further show that there was never any testimony adduced to support this allegation, or to support the judgment based on this allegation. Petitioner submits that Respondent could not and did not, in good faith, file both her affidavit that she had no knowledge of Petitioner's whereabouts and her trial amendment alleging that she had actual knowledge that Petitioner had placed the child in conditions which endangered the child's physical or emotional well-being.

C. No statement of the Evidence adduced at trial was prepared, approved by the Judge, or filed in the termination proceedings.

D. The Court erred in failing to meet its burden to inquire diligently into the efforts made to locate and apprise Petitioner of the proceeding against him. In fact, the record of the hearing, attached hereto as Exhibit "C", shows that the Court failed to make any inquiry whatsoever.

E. No answer or appearance was made on behalf of Petitioner.

F. Petitioner had ineffective assistance of counsel. Petitioner would show that his court-appointed counsel failed to assist and respresent him effectively in the following particulars:

(1) He failed to file an answer for Petitioner;

(2) He failed to detect the fatal error made in the attempt to effect personal service on the Petitioner as a nonresident;

(3) He failed to attempt to locate

Petitioner when he could easily have done so by contacting Petitioner's parents or Petitioner's sister.

(4) He failed to make any examination of Respondent, at hearing, as to Respondent's efforts to locate Petitioner;

(5) He failed to make examination of Respondent, at hearing as to Respondent's proof of the allegations made against Petitioner in her Petition for Termination;

(6) He failed to request the filing of a Statement of Evidence prior to entry of the Decree of Termination;

(7) He failed to object to entry of the Decree of Termination terminating Respondent as to William Bartley Joiner on the grounds of failure to support, when the Court had advised counsel that the Court would not terminate on the grounds of failure to support, when the

Court had advised counsel that the Court would not terminate on that ground;

(8) He failed to object to entry of the Decree of Termination terminating Respondent as to William Bartley Joiner on the grounds of placing the child in conditions which endangered the child, when no evidence supporting that allegation was presented. Petitioner would show the Court that court-appointed attorneys serving as ad litem for a party have a duty to perform as effectively as in other cases, and that Petitioner's court-appointed attorney totally failed to provide him with effective representation.

G. The best interest of the children must be the primary consideration of the Court, and that the best interest of the children the subject of this suit is not served by an affirmance of the termination of the

parent-child relationship between Petitioner and the children. Petitioner submits that the Agreed Temporary Orders entered by this Court on October 1, 1979, in Cause No. 76-165-W are manifest acknowledgment by this Court, by the guardian ad litem for the minor children, and by the parties thenselves that the relationship between Petitioner and his children should not be terminated, because such termination is not in the best interest of the children.

IX.

The fact that the attempt to serve citation upon Petitioner as a nonresident was not in compliance with the Texas Rules of Civil Procedure obviates the necessity of Petitioner's having to plead and prove that Petitioner was prevented from presenting his meritorious defenses by fraud, accident, or wrongful act of Respondent in order to obtain the bill of

review setting aside the decree of termination.

Additionally, the fact that the Decree of Termination states as a ground for the termination the Petitioner's alleged failure to support his children, in clear contradiction to the express findings of the Court, constitutes judicial error and thus a circumstances that obviates the neccessity of pleading and proving accident, fraud, or wrongful act of Respondent.

Petitioner would further show that Respondent's subsequent entering into an adoption contract with Petitioner, wherein she agreed to let Petitioner adopt the children the subject of this suit, after payment of certain sums of money to Respondent, misled Petitioner into not pursuing further legal remedies until it became apparent that Respondent intended to breach the contract.

WHEREFORE, PREMISES CONSIDERED, Petitioner prays that Respondent be cited to answer and appear for hearing on this Bill of Review.

Petitioner prays that the Bill of Review be granted and that the Decree of Termination be vacated and held for naught.

Alternatively, Petitioner prays that the Bill of Review be granted, that the Decree of Termination be set aside and that a new trial be ordered in the matter of Respondent's petition for termination.

Petitioner prays that the Court find that this Court was without jurisdiction to enter its Decree of Termination, that said Decree of Termination be vacated, set aside and held for naught.

Petitioner prays the Court enter its order restoring Petitioner's parental rights and obligations in and unto his

minor children, the subject of this suit.

Petitioner prays for costs of suit and for such further relief, at law or in equity, as the Court may deem proper.

Respectfully submitted,

ROBERTSON & WILKINSON, INC.

By: /s/ Charles H. Robertson
Charles H. Robertson
3016 LTV Tower
Dallas, Texas 75201
214/748-9211

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing was mailed to Mr. Steven Condos, attorney for Respondent, and Mr. Louis Davis, attorney ad litem, on this the 21st day of March, 1980.

/s/ Charles H. Robertson
Charles H. Robertson

NO. 80-7-W

IN THE INTEREST OF	IN THE 304TH
REBECCA LEIGH JOINER AND WILLIAM BARTLEY JOINER, Children	DISTRICT COURT DALLAS

PLEA IN BAR AND
MOTION TO DISMISS

TO THE HONORABLE JUDGE OF SAID COURT:

Comes now KAREN STEPHENS VASQUEZ, Respondent herein, and files this Plea in Bar and Motion to Dismiss and in support thereof would respectfully show the Court as follows:

I.

On February 24, 1977, Petitioner filed his Motion for Bill of Review in Cause No. 77-161-JUV in the Juvenile Court of Dallas County, Texas, which Court is now designated as the 304th Judicial District Court of Dallas County, Texas. On September 22, 1977, the Final Judgment on Bill of Review in the aforesaid cause was signed by the Honorable

Craig Penfold.

II.

On September 27, 1977, Petitioner filed a Motion for Bill of Review in Cause No. 77-855-W, in the 304th Judicial District Court of Dallas County, Texas. On March 7, 1978, the Honorable Craig Penfold signed an Order granting Respondent's Plea in Bar and Motion to Dismiss Petitioner's Motion for Bill of Review.

III.

The pleading filed herein which is designated Petition for Bill of Review involves the same parties, the same issues and the same cause of action as were involved in Cause No. 77-161-JUV and Cause No. 77-855-W. Accordingly, the Judgment in the former cause and the Order in the latter cause are bars to this action and Respondent relies on the defense of res judicata.

IV.

Further, Petitioner in this action fails to plead or prove that he was prevented from presenting a meritorious defense by fraud, accident or wrongful act of Respondent. Therefore, the Petition for Bill of Review should be dismissed for failing to contain the allegations required for relief by bill of review.

WHEREFORE, PREMISES CONSIDERED, Respondent prays that, upon hearing hereof, Petitioner's Petition for Bill of Review be dismissed with prejudice and Respondent prays for such other relief as the Court may deem just.

Respectfully submitted,

/s/ Steven G. Condos
STEVEN G. CONDOS
Attorney for Respondent
Suite 750
8350 N. Central Expressway
Dallas, Texas 75206
(214) 361-4277

NO. 80-7-W

IN THE INTEREST OF	IN THE 304TH
REBECCA LEIGH JOINER AND WILLIAM BARTLEY JOINER, Children	DISTRICT COURT DALLAS

ORDER DENYING BILL OF REVIEW

On the 27th day of March, 1980, came on to be heard Petitioner's Petition for Bill of Review in the above-entitled and numbered cause.

Petitioner, WILLIAM HENRY JOINER, JR., appeared by attorney and announced ready.

Respondent, KAREN H. VASQUEZ, appeared by attorney and announced ready.

Also appearing was LOUIS DAVIS, JR., appointed by the Court as guardian ad litem of the children the subject of this suit.

The Court after listening to the arguments of counsel finds that Petitioner's Petition for Bill of Review

should be denied as a matter of law, and

IT IS THEREFORE, ORDERED, ADJUDGED AND DECREED that Petitioner's Petition for Bill of Review be and the same is hereby denied as a matter of law.

SIGNED THIS 14th day of April, A.D., 1980.

/s/- Craig Penfold
JUDGE

NO. 80-7-W

IN THE INTEREST OF	IN THE 304TH
REBECCA LEIGH JOINER AND WILLIAM BARTLEY JOINER, Children	DISTRICT COURT DALLAS

MOTION FOR REHEARING

COMES NOW WILLIAM HENRY JOINER, JR., Petitioner in the above-styled and numbered cause and files this his Motion for Rehearing of his First Amended Petition for Bill of Review and would show the Court:

I.

The Court rendered judgment overruling Petitioner's First Amended Petition for Bill of Review during the pretrial hearing on said Petition. Petitioner was not afforded the opportunity to make a record for the purposes of appeal or for presenting a bill of exceptions. Petitioner requests the Court grant a rehearing of his First

Amended Petition for Bill of Review.

II.

Petitioner was not prepared for a full hearing at the time of the pretrial, Petitioner's chief counsel was not present at the pretrial hearing, and Petitioner was not afforded the opportunity to present any witnesses or testimony. Petitioner requests the Court grant a rehearing of his First Amended Petition for Bill of Review for these reasons.

WHEREFORE, PREMISES CONSIDERED, Petitioner prays the Court grant the relief requested herein by granting a rehearing of his First Amended Petition for Bill of Review.

Respectfully submitted,

ROBERTSON & WILKINSON, INC.

By: /s/ Charles H. Robertson
Charles H. Robertson
3016 LTV Tower
Dallas, Texas 75201
214/748-9211

NO. 80-7-W

IN THE INTEREST OF	IN THE 304TH
REBECCA LEIGH JOINER AND WILLIAM BARTLEY JOINER, Children	DISTRICT COURT DALLAS

ORDER DENYING PETITIONER'S MOTION FOR REHEARING

On May 13, 1980, came on to be considered Petitioner's Motion for Rehearing in the above-entitled and numbered cause. The Court, being satisfied that due notice of the filing of such motion and of the hearing thereon was given, and after considering the pleadings and arguments of counsel, is of the opinion that such motion should be denied.

IT IS THEREFORE ORDERED that Petitioner's Motion for Rehearing be and it is hereby denied.

SIGNED this 14th day of May, 1980.

/s/ Craig Penfold
JUDGE PRESIDING

EXCERPT FROM BRIEF FOR APPELLANT (pp. 8-12, 17-20) IN THE COURT OF APPEALS OF TEXAS FOR THE FIFTH SUPREME JUDICIAL DISTRICT

POINT OF ERROR NUMBER ONE RESTATED

The trial court erred in granting Mrs. Vasquez' Plea in Bar and Motion to Dismiss because the termination decree was void. (Germane to Tr. 55 and Supp. Tr. 3-5)

POINT OF ERROR NUMBER TWO RESTATED

The trial court erred in concluding that Joiner is foreclosed from attacking the termination decree by virtue of prior proceedings in the trial court. (Germane to Tr. 55, Supp. Tr. 3-5, and Supp. Tr. 46-48)

ARGUMENT AND AUTHORITIES

The issues involved in this litigation relate to the substantive question of what procedural requirements are mandated by Texas and federal,

constitutional and statute law when parental rights are terminated. Inextricably intertwined with this consideration is the question of when and by what method may termination decrees, which are rendered in disregard of legal requirements, be set aside as void. This necessitates a discussion of the subject of direct and collateral attacks on domestic judgments in the context of constitutional principles.

Parental Rights of Constitutional Dimension

The natural relationship between natural parents and their children is one of constitutional dimensions. In the Interest of G.M. et al, Children, 596 S.W.2d 846 (Tex. 1980); Wiley v. Spratlan, 543 S.W.2d 349, 352 (Tex. 1976), citing Wisconsin v. Yoder, 406 U.S. 205 (1972).

> "The Court has frequently emphasized the importance of the family. The rights to conceive and to raise one's children

> have been deemed 'essential', Meyer v. Nebraska, 262 U.S. 390, 399 (1923), 'basic civil rights of man,' Skinner v. Oklahoma, 316 U.S. 535, 541 (1942), and '[r]ights far more previous than property rights,' May v. Anderson, 345 U.S. 528, 533 (1953). 'It is cardinal with us that the custody care, and nuture of the child resides first in the parents, whose primary function and freedom includes the preparation for obligations the state can neither supply nor hinder.' Prince v. Massachusetts, 321 U.S. 158, 166 (1944). The integrity of the family unit has found protection in the Due Process Clause of the Fourteenth Amendment, Meyer v. Nebraska, supra, . . . the Equal Protection Clause of the Fourteenth Amendment, . . . and the Ninth Amendment, Griswold v. Connecticut, 381 U.S. 479, 496 (1965)." Stanley v. Illinois, 405 U.S. 645 (1972); In the Interest of G.M. et al, Children, supra at 846. (Parallel citations omitted.)

Due Process Requires Notice

As a consequence of the constitutional character of the right to rear one's children, notice and an opportunity to be heard is required by the due process clause of the Fourteenth

Amendment. Stanley v. Illinois, supra; In the Interest of K, 535 S.W.2d 168, 171-175(Tex. 1976), cert. den. 429 U.S. 907 (1976) - dissent. In this connection, the United States Supreme Court has stated the following:

> "Many controversies have raged about the cryptic and abstract words of the Due Process Clause but there can be no doubt that at a minimum they require that deprivation of life, liberty or property by adjudication be preceded by notice and opportunity for hearing appropriate to the nature of the case." Mullane v. Central Hanover Tr. Co., 399 U.S. 306, 313 (1950).
>
> "An elementary and fundamental requirement of due process in any proceeding which is to be afforded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections . . . Questions frequently arise as to the adequacy of a particular form of notice in a particular case . . . But as to the basic requirement of notice there can be

> no doubt, where, as here, the result of the judicial proceeding was permanently to deprive a legitimate parent of all that parenthood implies." Amstrong v. Manzo, 380 U.S. 545, 550 (1965).

In the Amstrong case, "[n]o notice was given Amstrong, although the Manzos well knew his precise whereabouts." Id at 547. Hence, it was not necessary for the high court to consider the propriety of citation by publication. As the following paragraphs indicate, this is not an open question.

Publication: Sham on Due Process

Citation by publication has been termed a sham. Johnson, "Citation by Publication: A Sham Upon Due Process," 36 Tex. B.J. 205 (Mar. 1973). See also Hemphill, C.J., in Edrington v. Allbrooks. 21 Tex. 186, 189 (1858), describing it as a "miserable substitute for personal service". For many years it has been characterized as a form of

constructive service which was not available when a personal judgment was sought against a nonresident. See McDonald, Texas Civil Practice, sec. 9.01.4 (1970); see also Sgitcovich v. Sgitcovich, 159 Tex. 398, 241 S.W.2d 142, 146 (1951); McDonald v. Mabee, 243 U.S. 90 (1917). A few cases permitted the use of publication in connection with the exercise of jurisdiction in personam over Texas domiciliaries. See Spinnler v. Armstrong, 63 S.W.2d 1071 (Tex.Civ.App.--El Paso 1933). While taking the traditional view with respect to non-residents that publication is not available when a personal judgment is sought,* Professor McDonald advises that

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*In May v. Anderson, supra, the plurality opinion of Justice Burton concludes that a parent's right to custody is a personal right "far more precious to Appellant than property rights" which cannot be affected in the absence of personal jurisdiction.

"publication alone is the least desirable form of service. Where service more calculated to impart actual notice is practicable, service by publication should be discountenanced by the court and avoided by counsel." McDonald, supra secs. 9.01.4, 9.21.2. The Texas Supreme Court has articulated the applicable principle in similar terms:

> "To dispense with personal service, the substitute that is most likely to reach the defendant is the least that ought to be done is substantial justice is to be done." Sgitcovich v. Sgitcovich, supra at 147.

The same philosophy is embodied in the opinion of the San Antonio Court of Civil Appeals (per Barrow, C.J.) in Forney v. Jorrie, 511 S.W.2d 379, 384 (Tex.Civ.App.--San Antonio, 1974 ref. n.r.e.). In Forney, a bill of review was filed to set aside a judgment which rested upon citation by publication. The

evidence presented at trial reflected that the plaintiffs in the original action were in contact with the complainant's parents and former attorney at the time of the issuance of the citation by publication. The court stated that where substituted service under Rule 106 could be used, publication was not appropriate since when personal service is not used, "the substitute service that is most likely to reach the defendant is the least that ought to be required if substantial justice is to be done."*

Regardless of whether the court accepts the traditional Texas view that citation by publication is not available when a personal judgment is sought against

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*McDonald also suggests the use of Rule 106. McDonald, supra at 9.21.2, n. 44.

a nonresident, the case law indicates clearly that publication is a deficient form of service when alternatives are more "reasonably calculated, under all the circumstances" to actually impart notice of the pendency of the action. It is respectfully submitted the requirements of both Texas law and the due process clause of the United States Constitution require that the judgment of termination be set aside because Mrs. Vasquez did not use the manner of substitute service "most likely" (see Sgitcovich, supra) to serve notice upon Mr. Joiner, i.e., that Mrs. Vasquez used citation by publication when she could have utilized substitute service under Rule 106, Tex. R. Civ. P. 106. In her affidavit for citation by publication (Tr. 68), her attorney stated that at the time he requested issuance of citation by publication, he was in contact with Mr. Joiner's parents and with several of his

"old friends." Yet, no attempt was made to secure service through one of these persons, or to advise them of the pending action. Substitute service through such persons would in all reasonable probability have provided Joiner with actual notice of the termination proceedings. The method of service was a "miserable" substitute, a "sham" which resulted in what the trial judge has referred to as "probably the worse record of any termination case" (B.R., S.F. 59), and a "fraud on the court." (B.R., S.F. 61). For the foregoing reasons the termination decree should be set aside as void.

. . . .

The Trial Court Lacked Personal Jurisdiction

It is undisputed that Mr. Joiner was a nonresident of Texas at the time that citation by publication was attempted

(T.R. 6-7). Apparently on the assumption that personal jurisdiction was not necessary, the trial court treated the proceeding as an old-style in rem action. There was neither allegation nor proof that Joiner was amenable to process issued by a Texas court.

Where a personal judgment is sought, due process requires that the defendant be given adequate notice of the suit and that he be subject to the personal jurisdiction of the court. World Wide Volkswagen Corp. v. Woodson, 100 S. Ct. 559, 564 (1980). In May v. Anderson, supra, Mr. Justice Burton's plurality opinion concluded that a parent's right to custody is a personal right which cannot be severed without jurisdiction in personam. In this connection, the United States Supreme Court has declared that a "judgment rendered in violation of due process is void in the rendering State."

World Wide Volkswagen Corp. v. Woodson, supra at 564.

Neither the requirements of Texas law with respect to securing jurisdiction of nonresidents or the requirements imposed by the Due Process Clause of the Fourteenth Amendment were satisfied in the proceeding in which Mr. Joiner's parental rights were terminated.

Requirements of Texas Law

William H. Joiner, Jr. submits that Mrs. Vasquez' failure to allege grounds for the Texas court's assertion of jurisdiction over him, a nonresident, renders the judgment void for lack of in personam jurisdiction. A record showing of jurisdiction necessary to support a default judgment upon substituted service upon a nonresident must meet two major requirements: 1) the pleadings must allege facts which if proven would make the defendant amenable to process under a

long-arm statute; and 2) there must be evidence in the record that the defendant was, in fact, properly served as prescribed by the statute. Whitney v. L & L Realty Corp., supra at 95. In the case at bar, the record clearly shows that Mrs. Vasquez failed to allege the existence of the conditions which, under Tex. Rev. Civ. Stat. Ann., art. 2031b or Sections 3.26 or 11.051 of the Texas Family Code, are a prerequisite to the acquisition of personal jurisdiction. See McKanna v. Edgar, supra at 930; Gathers v. Walpace Co., Inc., 544 S.W.2d 169, 169-170 (Tex. Civ. App.--Beaumont 1976, ref. n.r.e.); Day Bright Lighting Div. v. Texas Metalsmith, Inc., 499 S.W.2d 336, 337 (Tex.Civ.App.--Dallas 1973, no writ); Security Savings & Loan Ass'n v. Ward, 444 S.W.2d 366, 367 (Tex.Civ.App.--El Paso 1968, no writ).

Due Process Requirements

In Shaffer v. Heitner, 433 U.S. 186 (1977), the United States Supreme Court declared that "all assertions of state court jurisdiction must be evaluated according to the standards set forth in International Shoe and its progeny, "i.e, that the defendant must have "certain minumum contacts with the forum such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'" Shaffer v. Heitner, 433 U.S. 186 (1977). International Shoe Co. v. Washington, 326 U.S. 310, 316 (1945). In Mitchim v. Mitchim, 518 S.W.2d 362, 366 (Tex. 1975), the Texas Supreme Court said that in personam jurisdiction may be acquired over a nonresident defendant in a case of the nature of this one by extraterritorial personal service of process only if 1) the forum state has a statute authorizing jurisdiction over the person

by that process, and if 2) there have been sufficient contacts between the defendant and the forum relevant to the cause of action to satisfy "traditional notions of fair play and substantial justice."

The mere "unilateral activity of those who claim some relationship with a nonresident defendant cannot satisfy the requirement of contact with the forum State." World Wide Volkswagen Corp. v. Woodson, supra; Hanson v. Denckla, 357 U.S. 235, 253 (1958). Thus, in Kulko v. Superior Court, 436 U.S. 84 (1978), it was held that the mere act of sending a child to another state to live with the other parent "is not a commercial act and connotes no intent nor expectancy of receiving corresponding benefit in the State that would make fair the assertion of that State's judicial jurisdiction."

The Due Process Clause of the 14th

Amendment, therefore, acts to limit the power of a state court to render a valid personal jurisdiction against a nonresident defendant. World Wide Volkswagen Corp. v. Woodson, supra. Accord, U-Anchor Advertising, Inc. v. Burt, 553 S.W.2d 760 (1977).

> "Due process 'does not contemplate that a state may make a binding judgment in personam against an individual or corporate defendant with which the state has no contacts, ties, or relations.' International Shoe Co. v. Washington, supra, at 319, . . . Even if the defendant would suffer minimal or no inconvenience from being forced to litigate before the tribunals of another State; even if the forum State has a strong interest in applying its law to the controversy; even if the forum State is the most convenient location for litigation, the Due Process Clause, acting as an instrument of interstate federalism by imposing territorial limitations on state power, may sometimes act to divest the State of its power to render a valid judgment. Hanson v. Denckla, supra, 357 U.S. at 251 . . ."

World Wide Volkswagen Corp. v. Woodson,

supra at 565-66 (emphasis supplied).

In the case at bar no basis for the exercise of jurisdiction over Mr. Joiner is alleged (Tr. 6-7). In fact, his contacts were insufficient to satisfy the requirements of the Due Process Clause. Thus, under the constitutional premises espoused in the preceding authorities, the judgment of termination is void, and the trial court erred in granting Appellee's Plea in Bar and Motion to Dismiss.

EXCERPT FROM APPELLANT'S
MOTION FOR REHEARING (pp. 2-4)
IN THE COURT OF APPEALS OF TEXAS
FOR THE FIFTH SUPREME JUDICIAL
DISTRICT

1. POINT OF ERROR TWO: The Court of Appeals erred in holding that the judgment recitals in the decree terminating the parent-child relationship between William Joiner and his children could not be varied by extrinsic evidence because judgment recitals do not impart absolute verity when a collateral attack is made by a nonresident.

2. Argument and Authorities: The majority characterizes the jurisdictional problem as one involving only "lack of proper service of process, that is to say, lack of jurisdiction of the person." After making this characterization, the majority concludes that it is not subject to collateral attack since it reveals no lack of jurisdiction on its face and recites proper service. Even when the majority opinion's characterization is

accepted, the cases cited by the majority do not compel the conclusion that a collateral attack must fail because of the judgment recitals. The general rule in Texas is that when a judgment is collaterally attacked, public policy ordinarly precludes inquiry into evidence dehors the record. Crawford v. McDonald, 88 Tex. 626, 33 S.W. 325, 328 (1895) ("Whether an exception has been ingrafted upon this rule by the decision of the Supreme Court of the United States in Pennoyer v. Neff, 95 U.S. 565, and, if so, what is the effect thereof, is foreign to this discussion.") In this connection, both the courts and commentators have recognized "subsequent cases make clear that in attack by a non-resident the lack of jurisdiction may be shown by extrinsic evidence, and that recitations in the judgment may be contradicted." Hodges, "Collateral

Attacks on Judgments, 41 Tex. L. Rev. 499, 542 (1963) (Fn. 382: Milner v. Gatlin, 261 S.W.2d 1003 (Tex. Comm'n App. 1924 holdings improved. It is clear from the court of appeals opinion, 211 S.W. 617, 621 (Tex. Civ. App. 1919), that Martin v. Burns, 80 Tex. 676, 16 S.W. 1072 (1891), and other contrary cases were before the court. The holdings of the commission of appeals were approved by the Supreme Court. Hicks v. Sias, 102 S.W.2d 460 (Tex. Civ. App.--Beaumont 1937, error ref'd); First Nat'l Bank v. Alexander, 236 S.W. 229 (Tex. Civ. App. - 1921); see Bendy v. W.T. Carter & Bro., 14 S.W.2d 813 (Tex. Comm'n App. 1929, judgment adopted.) The reasoning behind this exception is that Texas public policy[1] does not override the Fourteenth

[1]As discussed below, it is extremely doubtful that Texas public policy elevates the interest of the public in finality above the best interest of children. See In the Interest of G.M., et al, Children.

Amendment of the United States Constitution. See Hicks v. Sias, 102 S.W.2d 460, 464 (Tex. Civ. App.-- Beaumont 1937 writ ref'd); O'Boyle v. Bevil, 259 F.2d 506, 513 (5th Cir. (Tex.) 1958); cf. Armstrong v. Manzo, 380 U.S. 545 (1965). This reasoning is particularly compelling in this case because it cannot be doubted that the integrity of the family unit has found protection in the Due Process Clause of the Fourteenth Amendment. Meyer v. Nebraska, 262 U.S. 390, 399 (1923); Stanley v. Illinois, 405 U.S. 645 (1972). Finally, nothing in Deen v. Kirk, 508 S.W.2d 70, 72 (Tex. 1974), or McEwen v. Harrison, 162 Tex. 125, 345 S.W.2d 706, 710 (1961), provides that a collateral attack is unavailable. See Hodges, "Collateral Attacks on Judgments," Tex. L. Rev. 163, 182-183 (1962).

EXCERPT FROM APPELLANT'S SECOND AMENDED MOTION FOR REHEARING (pp. 3-4) IN COURT OF APPEALS OF TEXAS FOR THE FIFTH SUPREME JUDICIAL DISTRICT

1. POINT OF ERROR TWO: The Court of Appeals errred in holding that the judgment recitals in the decree terminating the parent-child relationship between William Joiner and his children could not be varied by extrinsic evidence because judgment recitals do not impart absolute verity when a collateral attack is made by a nonresident.

2. Argument and Authorities: Prior to its opinion on rehearing the majority characterized the jurisdictional problem as one involving only "lack of proper service of process, that is to say, lack of jurisdiction of the person." After making this characterization, the majority concluded that it is not subject to

collateral attack since it reveals no lack of jurisdiction on its face and recites proper service. To the extent that the portion of the opinion on rehearing quoted above repudiates this analysis, this point of error has been rendered unnecessary.

Even when the majority opinion's characterization is accepted, the cases cited by the majority do not compel the conclusion that a collateral attack must fail because of the judgment recitals. The general rule in Texas is that when a judgment is collaterally attacked, public policy ordinarily precludes inquiry into evidence dehors the record. Crawford v. McDonald, 88 Tex. 626, 33 S.W.325, 328 (1895) ("Whether an exception has been ingrafted upon this rule by the decision of the Supreme Court of the United States in Pennoyer v. Neff, 95 U. S. 565, and, if so, what is the effect thereof, is foreign to this discussion.") In this connection,

both the courts and commentators have recognized that "subsequent cases make clear that in an attack by a nonresident the lack of jurisdiction may be shown by extrinsic evidence, and that recitations in the judgment may be contradicted." Hodges, "Collateral Attacks on Judgments, 41 Tex. L. Rev. 499, 542 (1963).

> [Fn. 382: Milner v. Gatlin, 261 S. W. 1003 (Tex. Comm'n) App. 1924 holdings improved. It is clear from the court of appeals opinion, 211 S.W. 617, 621 (Tex. Civ. App. 1919), that Martin v. Burns, 80 Tex. 676, 16 S. W. 1072 (1891), and other contrary cases were before the court. The holdings of the commission of appeals were approved by the Supreme Court. Hicks v. Sias, 102 S.W.2d 460 (Tex. Civ. App. --Beaumont 1937, error ref'd); First Nat'l Bank v. Alexander, 236 S.W. 229 (Tex. Civ. App--1921); see Bendy v. W. T. Carter & Bro., 14 S.W.2d 813 (Tex. Comm'n App. 1929, judgment adopted....]

The reasoning behind this exception

is that Texas public policy[1] does not override the Fourteenth Amendment of the United Constitution. See Hicks v. Sias, 102 S.W. 2d 460, 464 (Tex. Civ. App.-- Beaumont 1937, writ ref'd); O'Boyle v. Bevil, 259 F.2d 506, 513 (5th Cir. (Tex.) 1958); cf. Armstrong v. Manzo, 380 U.S. 545 (1965). This reasoning is particularly compelling in this case because it cannot be doubted that the integrity of the family unit has found protection in the Due Process Clause of the Fourteenth Amendment. Meyer v. Nebraska, 262 U. S. 390, 399 (1923);

[1]As discussed below, it is extremely doubtful that Texas public policy elevates the interest of the public in finality above the best interest of children. See In the Interest of G.M., et al, Children, 596 S.W.2d 846 (Tex. 1980); Wiley v. Spratlan, 543 S.W.2d 349, 352 (Tex. 1976).

Stanley v. Illinois, 405 U.S. 645 (1972). Finally, nothing in Deen v. Kirk, 508 S.W.2d 70, 72 (Tex. 1974), or McEwen v. Harrison, 162 Tex. 125, 345 S.W.2d 706, 710 (1971), provides that a collateral attack is unavailable. See Hodges, "Collateral Attacks on Judgments," 41 Tex. L. Rev. 163, 182-183 (1962).

EXCERPT FROM PETITIONER'S
APPLICATION FOR WRIT OF ERROR
(pp. 33-35) IN THE SUPREME COURT
OF TEXAS

POINT OF ERROR SIX RESTATED

The Court of Appeals erred in holding that the judgment recitals in the decree terminating the parent-child relationship between William Joiner and his children could not be varied by extrinsic evidence because judgment recitals do not impart absolute verity when a collateral attack is made by a nonresident. (Germane to Point of Error Two, Second Amended Motion for Rehearing)

ARGUMENT AND AUTHORITIES
UNDER POINT SIX

Prior to its opinion on rehearing the majority characterized the jurisdictional problem as one involving only "lack of proper service of process, that is to say, lack of jurisdiction of the person." After making this characterization, the majority concluded

that it is not subject to collateral attack since it reveals no lack of jurisdiction on its face and recites proper service. To the extent that the portion of the opinion on rehearing quoted above repudiates this analysis, this point of error has been rendered unnecessary.

Even when the majority opinion's characterization is accepted, the cases cited by the majority do not compel the conclusion that a collateral attack must fail because of the judgment recitals. The general rule in Texas is that when a judgment is collaterally attacked, public policy ordinarily precludes inquiry into evidence dehors the record. Crawford v. McDonald, 88 Tex. 626, 33 S.W. 325, 328 (1898) ("Whether an exception has been ingrafted upon this rule by the decision of the Supreme Court of the United States in Pennoyer v. Neff, 95 U.S. 565 (1878),

and, if so, what is the effect thereof, is foreign to this discussion.") In this connection, both the courts and commentators have recognized that "subsequent cases make clear that in an attack by a nonresident the lack of jurisdiction may be shown by extrinsic evidence, and that recitations in the judgment may be contradicted." Hodges, "Collateral Attacks on Judgments, 41 Tex. L. Rev. 499, 542 (1963).

> [Fn. 382: Milner v. Gatlin, 261 S.W.2d 1003 (Tex. Comm'n App. 1924 holdings improved. It is clear from the court of appeals opinion 211 S.W.2d 617, 621 (Tex. Civ. App. 1919), that Martin v. Burns, 80 Tex. 676, 16 S.W. 1072 (1891), and other contrary cases were before the court. Hicks v. Sias, 102 S.W.2d 460 (Tex. Civ. App.--Beaumont 1937, error ref'd); First Nat'l Bank v. Alexander, 236 S.W. 229 (Tex. Civ. App.--1921); see Bendy v. W.T. Carter & Bro., 14 S.W.2d 813 (Tex. Comm'n App. 1929, judgment adopted . . .]

The reasoning behind this exception is that Texas public policy[6] does not override the Fourteenth Amendment of the United States Constitution. See Hicks v. Sias, 102 S.W.2d 460, 464 (Tex. Civ. App. Beaumont 1937, writ ref'd); O'Boyle v. Bevil, 259 F.2d 506, 513 (5th Cir. (Tex.) 1958; cf. Armstrong v. Manzo, 380 U.S. 545 (1965). This reasoning is particularly compelling in this case because it cannot be doubted that the integrity of the family unit has found protection in the Due Process Clause of the Fourteenth Amendment. Meyer v. Nebraska, 262 U.S. 390, 399 (1923); Stanley v. Illinois, 405 U.S. 645 (1972). Finally, nothing in Deen v. Kirk, 508

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[6]As discussed above, it is extremely doubtful that Texas public policy elevates the interest of the public in finality above the best interest of the children. See In the Interest of G.M., et al, Children, 596 S.W.2d 846 (Tex. 1980); Wiley v. Spratlan, 543 S.W.2d 349, 352 (Tex. 1976).

S.W.2d 70, 72 (Tex. 1974), or McEwen v. Harrison, 162 Tex. 125, 345 S.W.2d 706, 710 (1961), provides that a collateral attack is unavailable. See Hodges, "Collateral Attacks on Judgments," 41 Tex. L. Rev. 163, 182-183 (1962).